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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MYESHA MITCHELL,
11 Plaintiff,

12 v.

13 THE CITY OF TUKWILA, *et al.*,
14 Defendants.

Case No. C12-238RSL

ORDER DENYING MOTION
TO STRIKE DEPOSITION
TESTIMONY

15 This matter comes before the Court on Plaintiff's "Notice of Objection and
16 Motion to Strike the December 11, 2013 Deposition Testimony of Defendants' Expert
17 John E. Hamm, M.D." (Dkt. # 84). Plaintiff seeks to exclude the perpetuation
18 deposition of Dr. Hamm because the deposition was scheduled to take place after the
19 Court's deadline for completing discovery and for reasons set forth in her motion *in*
20 *limine* related to Dr. Hamm's testimony.¹ Having considered the parties' memoranda
21 and supporting documents, and the remainder of the record, the Court finds as follows:²

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23 ¹ To the extent that Plaintiff relies on her motion *in limine* seeking to exclude the
24 perpetuation deposition testimony of Dr. Hamm, the Court finds these arguments moot as the
25 Court has denied Plaintiff's motion *in limine* related to Dr. Hamm.

26 ² Although Defendants' opposition to Plaintiff's motion was filed after the deadline,
see dkt. # 86, Plaintiff has not been prejudiced by the late submission and the Court has
considered the opposition.

1 (1) The deadline for completing discovery in this case was July 7, 2013. Dkt. #
2 15. Trial was initially scheduled to begin on November 4, 2013. Id. On October 29,
3 2013, the Court continued the trial date to January 6, 2014. Dkt. # 76.

4 (2) Federal Rule of Civil Procedure 32(a)(4) provides that the deposition of a
5 witness may be used “for any purpose” at trial if he or she “is more than 100 miles from
6 the place of hearing or trial or is outside the United States,” or, “on motion and notice,
7 that such exceptional circumstances make it desirable, in the interest of justice and with
8 due regard to the importance of live testimony in open court, to permit the deposition to
9 be used.” Here, Defendants seek to use the video deposition of Dr. Hamm in lieu of live
10 testimony because Dr. Hamm will be out of the country on the dates of trial. Dkt. # 96
11 at 2.

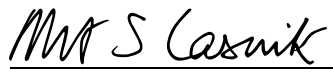
12 (3) There is no Ninth Circuit authority on the issue of whether perpetuation
13 depositions are “discovery” depositions subject to the limits in the Federal Rules of
14 Civil Procedure (“Rules”) or “trial” depositions exempt from those strictures. Authority
15 from
16 other districts is scant and conflicting. See, e.g., Energex Enterprises, Inc. v. Shughart,
17 Thomson & Kilroy, P.S., 2006 U.S. Dist. LEXIS 58395 (D. Ariz. 2006) (denying
18 motion to conduct additional depositions); Estenfelder v. Gates Corp., 199 F.R.D. 351
19 (D. Colo. 2001) (permitting depositions); Integra Lifesciences I, Ltd. v. Merck KgaA,
20 190 F.R.D. 556, 558 (S.D. Cal. 1999) (denying motion for depositions). As this Court
21 has previously explained, the Court finds more persuasive the cases holding that these
22 depositions are subject to the limits in the Rules because the Rules do not distinguish
23 between discovery and perpetuation depositions for trial. Mabrey v. Wizard Fisheries,
24 Inc., No. C05-1499L, 2007 WL 1795033, at *2 (W.D. Wash. June 8, 2007). The Court
25 therefore concludes that these depositions are subject to the time restrictions in the Rules
26 and the Court’s scheduling order.

1 (4) However, based on the particular circumstances presented in this case, the
2 Court finds good cause to extend the discovery deadline for this deposition. Fed. R.
3 Civ. P. 16(b)(4) (“A schedule may be modified only for good cause and with the judge’s
4 consent.”). Rule 16(b)’s “good cause” standard primarily considers the diligence of the
5 party seeking the modification. The district court may modify the pretrial schedule “if it
6 cannot reasonably be met with the diligence of the party seeking the extension.”
7 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). See also
8 Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1087-88 (9th Cir. 2002) (where plaintiff
9 failed to “demonstrate diligence in complying with the dates set by the district court,”
10 good cause was not shown).

11 (5) Here, Defendants did not learn of the need for a perpetuation deposition until
12 several months after the discovery deadline had passed. Within a day of the Court’s
13 order continuing the trial date, Defendants inquired as to Dr. Hamm’s availability and
14 learned that he was scheduled to be out of the country and would therefore be
15 unavailable to testify at trial. Dkt. # 97 at 4. Defendants promptly began conversations
16 with Plaintiff to schedule the perpetuation deposition of Dr. Hamm. Id. Despite
17 Defendants’ diligence and attempts to work with Plaintiff to schedule Dr. Hamm’s
18 perpetuation deposition, Plaintiff failed to cooperate. Dkt. # 97 at 4, 6, 14. In light of
19 the late continuance of this matter and Defendants’ diligent efforts to arrange for Dr.
20 Hamm’s perpetuation deposition as soon as they became aware of the need for it, the
21 Court finds good cause for taking this deposition after the discovery deadline. Zivkovic,
22 302 F.3d at 1087 (“The district court is given broad discretion in supervising the pretrial
23 phase of litigation.”) (quoting Johnson, 975 F.2d at 607).

24 For all of the foregoing reasons, Plaintiff’s motion to strike the perpetuation
25 deposition testimony of Dr. Hamm is DENIED.

1 DATED this 3rd day of January, 2014.

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4 Robert S. Lasnik
5 United States District Judge
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